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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 43

COLGATE-PALMOLIVE COMPANY,
Petitioner,

vs.

COOK CHEMICAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER

GEORGE H. MORTIMER
300 Park Avenue
New York, New York 10022

HOWARD A. CRAWFORD
JACK W. R. HEADLEY
15 West Tenth Street
Kansas City, Missouri 64105
Attorneys for Petitioner.

Of Counsel:
LATHROP, RIGHTER, GORDON & PARKER
15 West Tenth Street
Kansas City, Missouri 64105

R. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 336 F. 2d 110, and appears at R. 555. The opinion of the District Court for the Western District of Missouri is reported at 220 F. Supp. 414, and appears at R. 17.

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1964 (R. 564). A timely Petition for Rehearing En Banc was denied on October 9, 1964 (R. 577). The petition for a writ of certiorari was filed on January 6, 1965 and was granted on March 29, 1965. The jurisdiction of this Court is based on 28 U.S.C. Sec. 1254(1).

STATEMENT

By order of this Court entered March 29, 1965 (R. 580), this case was consolidated with No. 37, *Calmar, Inc., Petitioner,* v. *Cook Chemical Company, Respondent.* The two cases were consolidated for trial in the District Court (R. 15) and the District Court entered one judgment against both defendants (R. 36). Likewise, the two cases were consolidated on appeal to the United States Court of Appeals for the Eighth Circuit and that Court entered one judgment affirming the judgment of the District Court (R. 564). The record in both cases has been lodged with this Court as a joint record in both cases.

The device found by the Court of Appeals to infringe Respondent's patent is a pump-type finger-operated plastic sprayer for dispensing liquids which was produced by Calmar, Inc., sold by it to Colgate-Palmolive Company, fastened to the necks of insecticide bottles, and resold as part of the complete package by Colgate. The accused device described in Respondent's counterclaim for infringement against Calmar, Inc. (R. 3), and the accused device described in Count I of Respondent's counterclaim against Colgate-Palmolive Company (R. 13) are one and the same.

The question presented, the constitutional provision and statutes involved, the facts and the reasons for reversing and remanding the judgment of the Court of Appeals are the same in this case as in *Calmar, Inc.* v. *Cook Chemical Company*, No. 37.

It would unduly burden the Court if the Petitioner, Colgate-Palmolive Company, were to repeat here the contents of the brief filed or to be filed by Calmar, Inc., which Counsel for Colgate-Palmolive Company have read with great care. Therefore, this Petitioner adopts and incorporates by reference the statements of the Question Presented, the Constitutional Provision and Statutes Involved, and of the Facts, the Summary of Argument, the Argument and all Appendices contained in the brief of Calmar, Inc. in No. 37.

ADDITIONAL ARGUMENT

In addition to the argument presented in Calmar's brief Petitioner submits the following argument with particular reference to pages 20 and 21 of the Calmar brief where reference is made to No. 11, *Graham* v. *John Deere Co.*

This Court is being urged in the *amicus curiae* briefs of various bar associations in No. 11 to hold that Section 103 established a standard of patentability different from the standard applied in some of the cases decided in the years immediately prior to the enactment of the Patent Act of 1952. Notably in the brief of the American Bar Association it is urged "that Sec. 103 modified the 'exacting standard' which the Circuit Court of Appeals for the Eighth Circuit in this case [No. 11] (333 F. 2d 534) found 'implicit in the teachings' of *Cuno Engineering Corporation* v. *Automotive Devices Corp.*, 314 U.S. 84 (1941) and *Great A. & P.*

Tea Co. v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950)", and that Section 103 stated the governing standard substantially in the terms laid down in *Hotchkiss* v. *Greenwood*, 11 How. 248 (1850).

Calmar's brief argues that the cases decided by this Court immediately prior to the Patent Act of 1952 do not appear to amount to any departure from the standards which this Court has followed for a century beginning with the Hotchkiss case. But, regardless of whether the standard is phrased in terms of this Court's decisions or in terms of Section 103, the question of the validity of the Scoggin patent must certainly be answered in the negative.

In the terms of Section 103 would it have been obvious for a person having ordinary skill in the art of making dispensers for liquids in containers for household use at the time Scoggin was developing his pump to relocate the seal which Lohse (see page 4, Calmar's brief) disclosed under the holddown cap to a position above the collar where Scoggin put it (see page 3 and Appendix B, Calmar brief)? The answer must be a definite yes in view of Mellon and Livingstone (see pages 7 and 8 respectively of Calmar's brief) who clearly disclose this location for a seal in the same art. The prior art taught the location for the seal between a hold-down cap for a dispenser pump and the fixed parts of the pump structure. It was therefore merely a matter of choice for a man of ordinary skill in the art at the time Scoggin developed his pump whether he placed the seal in one location or the other. The effect of the holding by the courts below is to deprive the public of this obvious choice and thus take away from the public something it possessed prior to Scoggin. More specifically, Calmar and Petitioner have been held to be infringers for using the Livingstone cap and seal in a pump device

otherwise essentially a copy of Calmar's own prior pump dispenser (R. 480 and 488). The principle that "that which infringes, if later, would anticipate, if earlier" (cf *Knapp* v. *Morss*, 150 U.S. 221, 228 (1893)) should have application not only to Sec. 102 but also to Sec. 103 of the Patent Act of 1952 since both sections involve taking from the public that which it is entitled to make. However the standard is phrased, the invalidity of the Scoggin patent is plain.

CONCLUSION

For the reasons stated in the brief of Calmar, Inc., in No. 37, and the additional reason above set out, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with instructions to grant Petitioner's prayer for a declaratory judgment that the Scoggin patent is not valid and to dismiss Count I of Respondent's counterclaim against this Petitioner.

Respectfully submitted,

GEORGE H. MORTIMER
300 Park Avenue
New York, New York 10022

HOWARD A. CRAWFORD
JACK W. R. HEADLEY
15 West Tenth Street
Kansas City, Missouri 64105
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